

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 61911-0-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
TRACY ALAN ROLL,)	
AKA: SMILEY ROLL, SMILEY,)	
)	
Appellant.)	FILED: June 8, 2009
)	

Appelwick, J. — Roll appeals his conviction for possession of methamphetamine with intent to deliver. He contends that his trial counsel was ineffective for failing to object to prior bad acts evidence and hearsay from the arresting officer, and then for eliciting prior bad acts evidence and hearsay. Because trial counsel's decisions were related to the overall strategy and theory of the case, counsel was not deficient in his performance. We affirm.

FACTS

On January 7, 2008, at approximately 1:30 a.m., while on patrol with his canine, Hawkeye, Deputy Nyhus¹ conducted a license plate number check on a

¹ Deputy Nyhus is a K-9 handler in the patrol division of the Whatcom County Sheriff's

small red car. The red car had just made an abrupt turn into a closed business and did not signal its turn. Deputy Nyhus activated his emergency lights to stop the vehicle, but the driver accelerated slightly and drove into a large gravel parking lot. While the car was still moving, the driver jumped out of the vehicle and fled north. Observing that a passenger was still in the car, Deputy Nyhus had the passenger exit, patted her down for weapons, and detained her. The passenger gave Deputy Nyhus a false name.

When another officer arrived, Deputy Nyhus began tracking the fleeing driver with Hawkeye, starting from the driver's door of the vehicle. After a short distance, Hawkeye gave a narcotics alert. The officers located a plastic bag with what appeared to be narcotics. Officers retrieved the bag, noting that along with it was a paper towel. Because it was a damp night out but the paper towel and baggie were dry, officers concluded that the baggie must have been recently placed there.

Hawkeye continued to track the driver, locating him on top of a dumpster. Deputy Nyhus testified on direct-examination that after Tracy Roll stood up, he recognized him from "prior contacts." Deputy Nyhus took Roll into custody, checking his name for outstanding warrants and discovering that he had an outstanding felony warrant, all of which Deputy Nyhus explained on direct-examination.

In a search of the car, officers found bags of what appeared to be narcotics, two cell phones, a police scanner, an electronic scale with white

residue on it, plastic baggies, a glass pipe with residue on it, an eye glasses case with a syringe and pipe inside, an expandable baton, and \$280 in cash inside a red wallet lying on top of an open black purse. Testing by the Washington State Patrol Crime Laboratory determined that the narcotics in the car and the narcotics abandoned by Roll were methamphetamine. Deputy Nyhus testified on direct that the passenger denied ownership of the wallet and all other items in the car, except the purse, which she said was hers. Deputy Nyhus further explained that he did not trace ownership of the cell phones or the other seized items, because they were in Roll's vehicle under his control.

While in jail, Roll made phone calls, which the jail phone system automatically records. In two phone calls Roll made on January 7 and 8, 2008, Roll stated that he ran from the police because he had an outstanding warrant, threw the drugs into the bushes, and hid from the deputy on top of the dumpster.

The State charged Roll with unlawful possession of a controlled substance with intent to deliver, in violation of RCW 69.50.401(2)(B). After trial on May 27-28, 2008, a jury convicted Roll as charged. Roll was sentenced to serve 120 months, the high end of the standard range, due to his high offender score. Roll timely appealed.

ANALYSIS

Roll claims he was denied his right to effective assistance of counsel in several instances. First, he claims that counsel failed to object to inadmissible prior bad acts evidence elicited by the prosecutor during direct-examination of

Deputy Nyhus. Second, he claims that defense counsel failed to object to inadmissible hearsay evidence elicited by the prosecutor during direct-examination of the deputy, as well as eliciting the same evidence from the deputy on cross-examination.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007), review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Counsel's actions pertaining to the defendant's theory of the case do not constitute ineffective assistance. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

To show prejudice, the defendant must prove that, but for the deficient

performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the appellant must also show that the trial court would have sustained an objection to the evidence. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

I. Prior Bad Acts Evidence

Roll claims counsel failed to object to inadmissible prior bad acts evidence elicited by the prosecutor during direct-examination of Deputy Nyhus. During direct-examination, the prosecutor elicited testimony from Deputy Nyhus that he knew Roll from "prior contacts" and that Roll had an outstanding felony arrest warrant. Roll contends that there is no reasonable strategic basis for the failure to object to either statement, as neither statement fell within any of the exceptions to the general exclusion articulated in ER 404(b).²

The decision of when or whether to object is a classic example of trial strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Because we strongly presume that defense counsel's conduct constituted sound trial strategy, Roll must demonstrate that, in light of the entire record, no legitimate strategic or tactical reasons support the failure to object in these two instances. McFarland, 127 Wn.2d at 335.

² "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

Defense counsel knew³ that the tapes of the calls Roll made from jail would be played for the jury.⁴ In the January 8 call, Roll and an unidentified female discussed that Roll had run from the police because he had a warrant. To object to Deputy Nyhus's testimony, which only briefly touched on the outstanding warrant, would have been futile, as the court had already ruled that the tapes would be admissible. Further, an objection may have drawn the jury's attention to Roll's warrant and prior contacts more so than simply allowing Deputy Nyhus to continue his testimony. Counsel's failure to object did not fall below an objective standard of reasonableness.

II. Hearsay Evidence

Roll also contends that counsel failed to object to inadmissible hearsay evidence elicited by the prosecutor during direct-examination of the deputy, as well as eliciting the same evidence from the deputy on cross-examination. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). On direct, the prosecutor asked Deputy Nyhus whether the female passenger indicated whether she owned the wallet. He answered that "[s]he said it was not her wallet." On cross-examination and in closing argument, defense counsel's focus was to cast doubt upon Nyhus's decision to believe the passenger's statements, necessitating revisitation of the deputy's

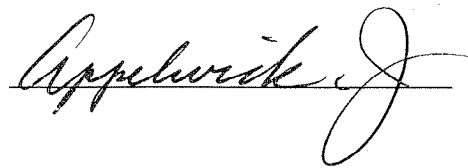
³ The court had ruled at the beginning of trial that the only obstacle to the admissibility of the tapes was a proper foundation. The State laid a foundation later in the case.

⁴ The jury heard the recordings of Roll's two calls after the testimony about the warrant and the prior contacts.

interaction with the passenger.

Our review of the record reveals that defense counsel's legitimate trial strategy, and his theory of the case, revolved around arguing that Deputy Nyhus rushed to judgment against Roll in assuming that the money, drugs, and drug paraphernalia in the car were Roll's instead of the passenger's. Because the passenger had lied to Deputy Nyhus about her identity, counsel made a reasonable choice in attempting to cast doubt on the passenger's statement that she did not own any of the drugs or paraphernalia. This strategy required that the jury have the information about the passenger's conversation, including her statement that the drugs were not hers. Neither counsel's failure to object during the State's direct-examination of Nyhus, nor his discussion in cross-examination and closing argument, fall below an objective standard of reasonableness. Rather, they were central to the theory of the case, so by definition, cannot constitute ineffective assistance of counsel. Garrett, 124 Wn.2d at 520. Any consideration of prejudice is therefore not warranted.

We affirm.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written in black ink.

WE CONCUR:

Schindler, CT Cox, J.